DOCUMENT RESUME

ED 071 105 CS 500 080

AUTHOR Anapol, Malthon
TITLE Rhetoric and Law: An Overview.
PUB DATE 70
NOTE 10p.
JOURNAL CIT Today's Speech; v18 n4 p12-20 Fall 1970

EDRS PRICE MF-$0.65 HC-$3.29
DESCRIPTORS Aristotelian Criticism; *Communication (Thought Transfer); Courts; Cultural Background; *Law Instruction; Lawyers; Medieval History; *Persuasive Discourse; *Rhetoric; *Western Civilization

ABSTRACT

Rhetoric and law had mutually beneficial influences on each other during the Graeco-Roman era. The relationship deteriorated during the middle ages because of a universal decline in learning, culture, and social organization; the hostility of the church toward rhetoric as a pagan concept; and the feudal structure in which there was no system of orderly government to prevail against individual domains. The disciplines of rhetoric and law were revived during the rebirth of learning and the development of the legal system in England, but in separate and different spheres. This segregation was a loss for both endeavors. The era since 1920, however, has witnessed the first signs of a trend toward the recognition of the role that rhetoric and law can play in association with each other. Legal realists have broken the ground for a broader view of the factors that contribute to an understanding of the legal system, and lawyers and judges are becoming aware of their problems in communication and rhetoric. (Author/RN)

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RHETORIC AND LAW: AN OVERVIEW

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REPRINTED FROM *Today's Speech*

The Journal of the Speech Association of the Eastern States

Fall, 1970, Volume 18, Number 4

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CS 500 080

TODAY'S SPEECH
VOL. 18, NO. 4, pp. 12-20

RHETORIC AND LAW: AN OVERVIEW

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Given Aristotle's classic definition of rhetoric, "So let Rhetoric be defined as the faculty of discovering in the particular case what are the available means of persuasion,"(1) one might expect to find an extensive literature revolving around the relationship between rhetoric and law. The fact is that no such literature exists in English and while rhetorical sources which mention law and legal concepts may be found as well as vice versa, there does not appear to be a single twentieth century treatment in English of the relationship between rhetoric and law.

There are two short articles which are sufficiently close to this inquiry to merit brief mention. Both deal essentially with the written opinions of judges and both conclude that the decisions of appellate court judges make considerable use of the principles of rhetoric.(2) The Belgian scholar Chaim Perelman has dealt with this area but his work has not been widely known in this country. We will return to him later.

In this paper I shall try to do three things. The first part of the paper will deal with rhetoric as a source of law and with the role of law as a force in the development of rhetoric. The second section of the paper will seek to discover why and how the early relationship between rhetoric and law changed. Finally, I shall suggest some reasons why rhetoric and law should renew their association of the classical era.

We can best approach the relationship between rhetoric and law by examining the pre-history of both areas. While such ancient sources as the Prisse papyrus and the Babylonian Talmud contain rhetorical and legal concepts, rhetoricians have tended to agree that the first systematic approach to rhetoric can be found in the works of Corax, a resident of Syracuse on the island of Sicily in the fifth century B. C.(3)

It would appear that Syracuse underwent a series of revolts, invasions, and tyrants that left behind a legacy of complex disputes over land titles and citizenship rights. Since there were no professional lawyers or advocates to turn to every citizen involved in such a dispute had to present his own case in the courts. As a result a group of teachers arose to meet this need for training in the presentation of legal pleadings and out of this need the primitive rhetoric of Corax emerged. The court customs and the rhetorical notions of Syracuse were carried to the mainland of Greece, where they were to develop further.

As Kennedy suggests, the need to present cases in court was a basic reason for the development of rhetoric in classical Greece.(4) But it remained for Aristotle to add the dimension of logic and dialectic and to see the role of rhetoric in the finding of facts in the trial situation. The twentieth century American legal realist Jerome Frank expresses some remarkably similar notions,(5) a matter we shall return to in the third section of this paper.

Aristotle on page one of the first book of *The Rhetoric* outlines clearly the relationship between rhetoric and law:

> Thus the arousing of prejudice, of pity, of anger, and the like feelings in the soul, does not concern the facts, but has regard to those who decide. Consequently, if trials were everywhere conducted as at present they are in some cities—and especially in those that are best governed—pleaders who were guided by the handbooks would have nothing to say; for by common consent the laws should forbid irrelevant speaking, and some courts actually do forbid it . . . the man who is to judge should have not his judgement warped by speakers arousing him . . . it is best that laws enacted on sound principles should, so far as may be, themselves determine everything, leaving as little as possible to the decision of those who judge; but the decision whether a thing has or has not occurred, will or will not occur, is or is not so, must be left in the hands of those who judge.(6)

Aristotle goes on to say that he will deal with logic and dialectic, something which he charges the earlier writers of rhetorical handbooks with neglecting.

The importance of Law in the Rhetoric can be seen when we observe that Aristotle devotes

[a]Parts of this essay are based on materials from the author's Introductions to his *The Principles and Practice of Freedom of Speech* (Houghton Mifflin, in press), *The Rhetoric of Nonverbal Communication* (Scott, Foresman, in press), and *Dissent: Symbolic Behavior and Rhetorical Strategies* (Allyn and Bacon, in press).

about thirty-five pages of Book I, and this amounts to almost half of the book, to the topic of forensic or courtroom speeches. He covers such topics as: accusation and defense, wrong doing, its agents and its victims; actions just and unjust, in relation to law and equity; the comparison of wrongs; and under non-artistic proofs such things as laws, witnesses, and contracts. (By non-artistic proof Aristotle meant proof or evidence which existed apart from the invention of the speaker.)

Aristotle can be seen to have exerted an influence on law when he developed certain concepts, for example on equity, he has a number of interesting observations.

> The second kind of unwritten law supplies deficiencies of the particular, written law, for equity (merciful consideration of circumstances) is regarded as a kind of justice, but is a justice that extends beyond the written law. This extension is made possible by the legislators, in some cases unintentionally, in others on purpose. It is intentional when they find themselves unable to make the law precise, and are forced to lay down a sweeping rule, but only one that is applicable to the majority of cases; also when the endless number of possible cases makes it hard to frame specific laws—hard, for example, in regard to 'wounding with an iron instrument,' to specify sizes and kinds . . . To the province of equity belong all acts that should be excused . . . A mishap is something that cannot be foreseen, and is not the result of wickedness; an error something that could have been foreseen, but is not the result of wickedness; a wrong something that was not unforeseen and does result from wickedness—for all such wrongs that come about through desire result from wickedness. It is equitable to consider the common failings of mankind . . .(7)

While we have already considered some of Aristotle's basic contributions to legal theory in *The Rhetoric,* there are constant references to court procedure throughout the work. In Book II the nature of logical proof is examined and this area would be generally applicable to establishing fact in the court, although no special methods for use in legal speeches are suggested.

In Book III Aristotle deals primarily with arrangement and language and here he has specific suggestions for the trial situation.

> Thus, if the point is that an act was not committed, then your primary concern at the trial is to show just that. If the point is that the act did no harm, there is the thing you are to prove; and similarly with the issues that the harm is less than is alleged, or that the act was justified; whichever is the point, that is your primary concern, and as much your concern as if the issue were whether or not the act was committed. But bear in mind that this issue (Was the act committed) is of the four, the only one in which it can be true that either the defendant or the accuser is necessarily a rogue. Here ignorance cannot be pleaded, as it might be if the parties were disputing whether the act was justified or not . . . Forensic speaking has to do with matters of fact—now true or untrue, and necessarily so; here strict proof is more feasible, since the past cannot change.(8)

Both ancient and contemporary writers have come to regard Aristotle's *Rhetoric* as a major source of legal theory. Max Hamburger says that *The Rhetoric* contains the consummation of Aristotle's legal philosophy and theory. He considers the major legal contributions of the work to include: criminology in regard to the causes and origins of human actions and hence of wrongdoing as well; the concept of equity; and its influence on Roman law.(9)

Cicero spoke of Aristotle's *Rhetoric* as the standard work, indispensable to every orator, as the main source of the theory and devices of forensic oratory.(10)

It seems clear that Aristotle's *Rhetoric* was the major legal treatise of its time. Of course every man continued to represent himself and no professional class of advocates or lawyers existed. In time a group of logographers developed who for a fee served as ghostwriters of speeches to be used in court. The practice was frowned upon and legend has it that Lysias was banned from Athens for engaging in the practice.

While the Roman legal system and Roman law are still studied, although less now than formerly, what is not often considered are the legal contributions of Roman rhetoricians. Interestingly enough for purposes of this study, the two leading Roman writers on rhetoric, Cicero and Quintillian, were both advocates or lawyers, and both attained considerable renown as advocates. It is not surprising then that both interwove legal concepts with their work on rhetoric. In *De Oratore* Cicero discusses the client interview in these terms.

> For my part, I take pains to learn from the client himself, alone, that he may talk more freely, and to debate against him, that he

> may defend himself and advance whatever arguments he has thought out. When I have dismissed him, I quite dispassionately take three parts; my own, my opponent's, the judge's. Whatever arguments promise more help than embarrassment I settle on, rejecting others in the same way. By this plan I manage to think at one time and speak at another. Some speakers have the confidence to do both at once; but I am sure that they too would speak somewhat better if they recognized the advisability of setting aside one time for thought, another for speech.(11)

Cicero developed a trichotomy for finding the issues or *status* in the legal case. First was *causa* or the reason for committing the crime; then *persona* or the personal circumstances of the agent; and finally *factum* or the particulars of the crime itself as evidence of the guilt or innocence of the suspected.

While Cicero's works on rhetoric abound with references to the courts, the advocate, and the judge, Cicero makes few truly original contributions to legal theory or to rhetoric. But Cicero is important to rhetorical theory because he did adapt and restate much of Aristotle and as a result carried Aristotelian concepts into Roman rhetoric. While Aristotle recognized the role of non-logical arguments and language in forensic speaking, Cicero tended to place greater emphasis upon such an approach. He advises that:

> Men take a decision oftener through feeling than through fact or law. They are moved by evidences of character in the speaker and in his client. The only way to rebut feeling is by feeling.(12)

Marcus Fabius Quintilian first achieved reputation and fame as a pleader in the Roman courts. Unlike Cicero, he avoided politics. Among his better known cases was that of the Jewish Queen Bernice whom Quintilian represented in a trial in which the Queen herself was the judge. Quintilian began his teaching as a private tutor, but in 88 A.D. he was placed in charge of the first public school of Rome with an annual salary paid from public funds.(13) *The Institutes of Oratory* was written by Quintilian late in his career and represents a distillation of his considerable experience as both a successful lawyer and a successful teacher, indeed he may be counted the most highly honored teacher of his time and place.

Much of what has been said of Cicero may also be said of Quintilian; that is he rephrased and rewrote Aristotle. But Quintilian did have some interesting things to say which appear applicable to this inquiry, and he did make two distinct contributions which were perhaps matters of emphasis rather than true inventions of new concepts.

Quintilian begins his discussion in *Institutio Oratoria* with three leading questions: *an factum sit, quid factum sit, an recte factum sit*—whether an act had been committed, what sort of an act had been committed, and whether the committed act was justified or unlawful.(14) The relationship to the lawyers' analysis of his case is obvious. Secondly Quintilian emphasized the Aristotelian concept of ethos. He constantly declares that the true orator is "the good man speaking well". By this he means that we tend to accept or reject what a man says in terms of what we think of the man addressing us.

Another contribution of Quintilian to law was the use of the *controversiae;* these were the forerunners of the hypothetical cases still used in law schools. Baldwin cites the following as an example of the *controversiae:*

> "Aiding an exile with shelter or food is prohibited. The penalty for homocide shall be exile for five years."
>
> The father of a son and a daughter was found guilty of homocide and exiled. He used to come to one of his properties near the frontier. The son learned this and punished the overseer. The overseer excluded the father. The father began to go to his daughter's. Tried for harboring an exile, she was acquitted on the plea of her brother. The five-year period having expired, the father disinherits the son. (Speak for either the father or the son.)(15)

While exact origin of the practice and the cases is not clear, it is known that Quintilian strongly favored the use of these hypotheticals in his school. With Quintilian the age of great Roman rhetoricians came to a close.

Max Hamburger summed up the role rhetoric played in the classical era when he wrote, ". . . rhetoric played an essential part in the educational system of the Greco-Roman world; it was the vehicle of higher education (corresponding to modern high school and the first years of college) and constituted the medium in which the basic concepts of legal and political science were imparted to the young."(16)

RHETORIC AND LAW: AN OVERVIEW

In looking back at the Greco-Roman era it seems clear that the needs of those societies for a dispute settlement system gave rise to the development of both rhetoric and law. The growth and development of the two areas were interdependent. In the Greek culture law was not highly developed and the rhetoricians provided most of the training for the advocate and much of the writing concerning jurisprudence.

The Romans were more concerned with legal matters since they had an extensive empire to govern, but perhaps because of the Greek influence rhetoric was a major component of the Roman legal system. While the Roman advocate needed to be familiar with the legal code he tended to be more concerned with pleading than with procedure. This was probably because his functioning as a lawyer was mostly in the courts rather than as an adviser in commercial transactions or estates and trusts.

II

In view of the intimate relationship between rhetoric and law in the classical era it would seem likely that the association would have survived into modern times. Since we know that this is not the case, we must seek explanations in the events and trends of the medieval period which followed the collapse of the Roman Empire.

I would posit the thesis that the decline of rhetoric and law was inevitable because of conditions prevalent during the middle ages and that the subsequent development of rhetoric and law in separate intellectual compartments were also inevitable byproducts of the times.

One problem was the distrust many of the early church fathers held for the pagan rhetoric of Greece and Rome. A leading scholar of the rhetoric of the era sums it up well:

> The basic issue was whether the Church should adopt the contemporary culture which Rome had taken over from Greece. The fate of rhetoric, as a part of the Greco-Roman culture, was involved not only in the debate over the larger issue, but in more limited controversies about its own merits.
>
> Cyprian, who had been a teacher of rhetoric at Carthage when he had been converted, renounced profane letters completely and for the rest of his life never again quoted a pagan poet, rhetorician or orator.(17)

In general the churchman of the period were suspicious of the entire pagan culture and preferred to look to the Bible for learning and literature. Indeed Cyprian stated the church position clearly:

> In courts of law, in public meetings, in political discussions, a full eloquence may be the pride of vocal ambition, but in speaking of the Lord God, a pure simplicity of expression which is convincing depends upon the substance of the argument rather than upon the forcefulness of the eloquence.(18)

At this critical point in the history of rhetoric, Saint Augustine appeared with his *De Doctorina Christiana,* which preserved at least the basic aspects of classical rhetoric but adapted it to the propagation of the faith. Murphy maintains that if Augustine had not endorsed rhetoric in his works, its transmission to our times might have been an open question.(19)

But Augustine, a former teacher of pagan rhetoric himself, quite naturally emphasized the homiletic aspects of rhetoric and paid little attention to the forensic and legalistic portions of the classical works available to him.

Because of the pervasive influence of the church on the western culture of this period, the forensic and legalistic overtones of rhetoric so heavily emphasized by Aristotle and followers suffered considerable neglect. Aristotle's handbook seems to have been available during most of the medieval period but it was not widely studied or followed as text on oral or written discourse. The interest in it was probably in the areas of ethics, morality, and politics.(20) In fact the practice of rhetoric and of law were both in a state of decline as practical arts. Feudalism had replaced the Roman system of orderly government, and there were no senates, no courts, no political discussions.

In discussing this era from a legal viewpoint Bigelow says: "No vigorous centralized judicial system could operate under these conditions, since the Sovereign could not enforce process against the owner of a fortress without an obedient force capable of breaching the walls. Accordingly the feudal hierarchy sank into anarchy . . ."(21)

Such rhetoric as existed was practiced mainly in the sermons of the priests and in the work of the professional writers of letters, the latter practice came to be known as *"ars dictaminis"*. It was under these conditions that men almost completely lost sight of the once intimate connection

between law and rhetoric.

Interest in and the study of classical rhetorics did not entirely disappear during the middle ages. It would appear that Cicero was the favorite rhetorical authority of the period, and that his minor works like *De Inventione* were most often studied.(22) Interest in his other works had to wait for the Renaissance. Interestingly enough Cicero's rhetorical works were important to what little study of law remained through the medieval period.

> Even the teaching of law in Italy demonstrates the ubiquity of Ciceronian influence. Certainly the *De Inventione* and the first half of the *Ad Herennium* would be eminently adaptable to legal studies, designed as they are for the actual study of forensic oratory. Isidore of Seville recognized this relation by including a paragraph about law in his treatment of rhetoric. . . . Alcuin's *Dialogue* with Charlemagne shows a keen awareness of legal lore in the Ciceronian tradition . . . The intention of the author is to utilize both law and rhetoric, "to instruct readers in judicial issues partly from canon law and partly from the artistic doctrines of the rhetoricians,"(23)

Since some remnants of classical rhetoric and some of the relationship of rhetoric and law did survive the middle ages, there must have been other factors operating to affect our area of concern. A sixteenth century French monk, Peter Ramus, may well have been a significant factor at the critical moment. Like many teachers of today Ramus felt that the traditional disciplines of his day overlapped each other excessively. He considered the overlapping wasteful of time and effort and he set about to modernize and improve.

Ramus believed that the study of logic, proof, invention of ideas, arrangement of ideas, (the things Aristotle had stressed) really belonged to the study of logic. Ramus never wrote a "new rhetoric" since he chose to write in the field of logic and dialectic. However, his disciple, Omer Talon, published *Training in Oratory,* in 1554.(24)

With proof, invention, and arrangement removed rhetoric was left with what Aristotle had regarded as the frills, such elements as style, delivery, and figures of speech. Howell points out that Ramist concepts were especially significant in England for more than a century, and no less a figure than Hobbes was influenced by them.(25)

From our point of view Ramus' timing was most unfortunate since it diverted rhetorical thought from the concern with forensic speaking, dialectic, and fact finding, that had been characteristic of classical rhetorics. And this happened just at the point in time when England was beginning to establish a stable legal system. It seems highly probable that Coke and Blackstone were simply not acquainted with classical rhetoric when they began to write on the law of England.

If we generally review the medieval period we can see two sets of factors in operation which affect both rhetoric and law, both as separate entities and as related disciplines. The first factor is the universal decline in learning, culture, and social organization. The second factor is the special problems which beset rhetoric as a result of church hostility and suspicion of pagan writings.

While a concept of rhetoric did survive the middle ages it was one which was different from that of the Greco-Roman era. As a result of Ramistic and medieval influences rhetoric was seen as primarily the art of amplifying and beautifying man's thoughts. The revival of law in England also involved changes. England had been a Roman colony with Roman law and Roman courts but succeeding waves of invaders brought new customs along with new languages and modes of thought.

The end product was a legal system based upon previous actions of the king, his chancellor, and the royal courts. No doubt basic concepts were carried over from Roman law, but English common law which also became the foundation of American law, developed without any great concern for the legal and rhetorical traditions of the past. Thus the separation of rhetoric and law became virtually complete.

III

We have observed that while rhetoric and law were considerably intertwined during the Greco-Roman era, they drifted in largely different directions during the medieval period. As rhetoric and law were revived as intellectual disciplines and as practical arts they tended to develop in isolation from each other, thus perpetuating what had been initially an almost accidental division.

In England clergymen continued to be the principle writers on rhetoric during the eighteenth century revival of interest in classical rhetoric. It is of more than passing interest that Hugh Blair, George Campbell, and Richard Whately were all

preachers. Hence, while preaching did not dominate rhetoric as much as it did in the middle ages, the church was a significant influence in the development of modern English rhetorical theory.

Law continued to develop in its own way and while philosophers like Kant, Hobbes, and Bentham contributed to the growing study of jurisprudence, rhetoric and rhetoricians seemed to be living in a different universe.

One other figure who can contribute to our understanding of the development of the American legal system was Professor Langdell of the Harvard Law School. Langdell believed that the law student should be trained by the study of significant opinions of appellate courts. His introduction of the case study method at Harvard served to institutionalize that approach in the American Law School and in the American legal system. The result was that the law student was trained almost exclusively in the searching out and the interpretation of legal cases bearing upon the subject he was considering. This kind of training produced a lawyer who was more at home in the law library than in the courtroom or as Chief Justice Arthur T. Vanderbilt succinctly put it, "To a member of the legal profession one problem rises above all others. A decline has been recognized in the ability of legal advocates to communicate."(26)

Like rhetoric the law is a complex and diverse discipline and thus inevitably the Langdell approach to the law began to be questioned. That group of legal thinkers who questioned a complete adherence to law library cases and precedents came to be called legal realists. A leader in this group of skeptics was Professor Karl Llewellyn of Columbia University who in 1930 wrote:

> One observes the importance of the official formulae as tools of argument and persuasion; one observes both the stimuli to be derived from, and the limitations set by, their (rules of law) language. Very rapidly too, one perceives that neither are all official formulae alike in these regards, nor are all courts, nor are all times and circumstances for the same formula in the same court. The *handling* of the official formulae to influence court behaviour then comes to appear as an art, capable only to a limited extent of routinization or (to date) of accurate and satisfying description.(27)

It seems reasonable to label Llewellyn's art of handling rules of law to influence court behaviour as legal rhetoric. In fact Llewellyn suggested many times that lawyers might well study rhetoric and semantics as part of their preparation for their profession, but nowhere does he appear to have considered the theoretical implications or historical basis of the legal-rhetorical relationship.

Llewellyn's contemporary and another leader in legal realism was the late Judge Jerome Frank. In *Courts on Trial* Frank considers at length the role that the attitudes of judges and jurors play in our judicial system.(28) He expresses considerable concern over the failure of law schools and lawyers to analyze such extra-legal considerations. The relationship of this notion of Frank's to Aristotle's and rhetoric's concern with audience analysis hardly needs to be cited. Frank seems familiar with rhetorical concepts and cites Aristotle's *Rhetoric* nineteen times in *Courts on Trial;* only the great Supreme Court Justice, Oliver Wendell Holmes is cited more often.(29)

Frank's quotations of Aristotle deal mainly with such areas as natural law and the concept of equity. Frank never quite comes to discussing rhetoric as a methodology for arguing about facts and persuading courts. This omission is striking since Frank constantly stresses his formula "R x F = D". By this he means that the legal rules applicable to the case (R) multiplied by the facts in the case (F) results in the court decision (D). Frank is critical of the law schools and the legal system because it is preoccupied with the legal rules half of his formula to the almost total neglect of the fact determination and decision making processes.

It seems unfortunate that Frank did not go a step further and consider the role of rhetoric in the determination of fact to the satisfaction of the jury and the role of rhetoric in the making decisions. This step has been taken however by the Belgian philosopher-rhetorician-lawyer, Chaim Perelman in his writings.(30)

It is too soon to tell how great an impact Perelman will have on American rhetorical and jurisprudential theories. His work is just beginning to be read and studied in America and he comes from a different legal tradition. Belgium like most European countries operates under a civil code system of law where the judge is charged with carrying out the law as set forth in the written codes of the country. Anglo-American legal concepts tend to grow out of common law,

the law which develops gradually from the opinions of the courts, which in turn serves as precedent for future court action. The dichotomy is not total; civil code systems are influenced by court interpretation of the code and common law systems are influenced by statutes passed by legislative bodies.

It does seem reasonable to this writer to suggest that if rhetoric and law are to serve each other the work of M. Perelman will serve as a significant catalyst.

The American legal philosopher Felix Cohen has also been deeply concerned with the problems of legal realism and while he takes issue with Jerome Frank, he also seems to set forth a position in which rhetoric will play a role in the law:

> A truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality, as concomitantly and even more importantly a function of social forces, that is to say as a product of social determinants and an index of social consequences. A judicial decision is a social event. Behind the decision are social forces that play upon it to give it a resultant momentum and direction; beyond the decision are human activities affected by it . . . That decision involves us in a prediction, a prophecy of the weight that courts will give to future citations of the decision rendered. This is a question not of pure logic but of human psychology, economics and politics.(31)

While Cohen suggests no methodology that the advocate might utilize in his "truly realistic theory of judicial decisions", this writer agrees with Perelman who writes that rhetoric conceived as the study of methods of argument, may clarify the most diverse areas of human thought including the law.(32)

If legal cases are to be argued in terms of social and psychological factors, then lawyers will more than ever be rhetorical advocates in the Ciceronian sense. It appears to be a reasonable assumption that the reason that the advocate of the classical era studied rhetoric rather than law was simply that there was so little codified law or legal theory to study. Today there is no shortage of law available to study and no one would propose that the study of rhetoric replace the study of law, but rhetoric would appear to be closely related to the work the lawyer does and seem worth serious attention in his training.

In discussing the relationship of rhetoric to law in the twentieth century, we have dealt so far only with the notions of law professors, theorists, and judges. Perhaps I can best conclude with the opinions of an active practicing attorney relative to what the actual work of the lawyer consists of:

> In common with others, the lawyer functions in various ways and situations as a peacemaker—negotiating, arbitrating, seasoning his clients' demands with a sprig of objectivity or structuring a situation to allow people, essentially desirous of working their way out of a situation which they find distasteful, to save face and re-establish communication. Fundamental to the broad spectrum of the lawyer's work is the art of communication—communication both sending and receiving, communication in the relatively informal setting of *ex parte* interviewing of clients, witnesses, or associates, communication in the relative formality of the courtroom, communication in the negotiation process, communication (perhaps to an unidentified audience) through the written word, whether the document be a letter to be understood on receipt of tomorrow's mail, or a lease or contract to be understood ten (10) years hence. Nor, as we have more recently been made aware, can the subtleties of "non-verbal communication" be ignored.(33)

This would indicate that the time has come to give careful attention to the long standing relationship between rhetoric, law and communication.

Why should lawyers and law students study rhetoric? In the first place, the lawyer is always persuading. He is trying to convince a client or another lawyer's client to accept a point of view based on his prediction of what a court might do. And if he fails in this he must convince a judge or jury to accept his analysis of the "theory of the case".

Second, a lawyer seeks to analyze every situation that is brought to him in his professional life. He must make a logical analysis to determine the issues, the precedents, the causes of action, the breaches of duty.

Third, a lawyer must determine the objective facts in every situation, he must find support and corroboration for his view of the facts in the situation.

Fourth, a lawyer must deal with and understand people. As Jerome Frank suggests, the judge's digestion or his attitude toward women may greatly influence the decision that the judge will render.(34) Members of a jury are people

and they do not leave their feelings and prejudices behind when they enter the jury room.

While the study of rhetoric would not be a golden key which would unlock all of the previously cited problems of the lawyer, rhetoric would at least provide some guidance since it deals with the same kind of problems. Research in the problems of legal rhetoric might provide more clues and ultimately more answers.

IV

Trying to write about two fields of study has been compared to attempting to sit simultaneously on two chairs: one is made uncomfortable and much is left uncovered. But if this effort to review the relationships between rhetoric and law elicits only criticism and comment it will have served a somewhat useful purpose.

It has been my position that rhetoric and law were significant influences on each other in the Graeco-Roman era and that the relationship was mutually beneficial. The detente of this relationship, it seems to me, was brought about by the special conditions of the middle ages. Rhetoric became a branch of homiletics and law was unable to penetrate the walls of feudal castles.

When these disciplines were revived during the rebirth of learning and the legal system in England they each developed in separate and different spheres. This segregation was a loss for both endeavors.

The era since 1920 has witnessed the first signs of a trend toward the recognition of the role that rhetoric and law can play in association with each other. The American legal realists have broken the ground for a broader view of the factors that contribute to an understanding of the legal system and lawyers and judges are becoming aware of their problems in communication and rhetoric. Most recently the Belgian scholar Chaim Perelman has begun to write in the area of jurisprudence and rhetoric and his work may serve to further develop the incipient concern with the relationship between rhetoric and law.

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NOTES

(1) Aristotle, *The Rhetoric,* (trans. by) Lane Cooper, (New York 1932), p. 7.
(2) Thomas Reed Powell, "The Logic and Rhetoric of Constitutional Law", *The Journal of Philosophy, Psychology and Scientific Method,* XV (Nov. 21, 1918), p. 648
Warren E. Wright, "Judicial Rhetoric: A Field for Research," *Speech Monographs,* XXXI (March, 1964), p. 71-72.
(3) Carol Arnold and John F. Wilson, *Public Speaking as a Liberal Art,* (Boston, 1964).
(4) George Kennedy, *The Art of Persuasion in Greece,* (Princeton, 1963), p. 27-28.
(5) ———, Courts on Trial, (Princeton, 1949).
(6) Aristotle, *op. cit.,* p. 1-2.
(7) Aristotle, *op. cit.,* p. 76-77.
(8) Aristotle, *op. cit.,* p. 232-33.
(9) Max Hamburger, *Morals and the Law,* (New Haven 1951), p. 65.
(10) Cicero, *De Inventione,* II, 6, *De Oratore,* II, 160, (trans. by) E. W. Sutton, (Cambridge, 1942).
(11) Cicero, *De Oratore,* (trans. by) W. B. Owen, (Boston, 1895), p. 101.
(12) Cicero, *op. cit.,* p. 178.
(13) James J. Murphy, (editor), *Quintilian on the Early Education of the Citizen-Orator,* (New York 1965), ix.
(14) Quintilian, *Institutio Oratoria,* (trans. by) H. E. Butler, London, 1921, III 11.2-3 ff.
(15) Charles Sears Baldwin, *Ancient Rhetoric and Poetic,* (New York, 1924), p. 93.
(16) *op. cit.,* p. 181.
(17) James J. Murphy, "Saint Augustine and the Debate About a Christian Rhetoric", *Quarterly Journal of Speech,* XLVI (December 1960), p. 400-401.
(18) Gerard L. Ellsperman, *The Attitude of the Early Christian Latin Writers toward Pagan Literature and Learning,* (Catholic University of American Patristic Studies, Vol. 82; Washington, D. C., 1949), p. 51.
(19) James J. Murphy, *op. cit.,* pp. 406-407.
(20) James J. Murphy, "Aristotle's *Rhetoric* in the Middle Ages", *Quarterly Journal of Speech,* LII, (April 1966), pp. 109-115.
(21) Melville W. Bigelow, (editor) *Lectures Given at Boston University Law School,* (Boston, 1906), p. 37.
(22) James J. Murphy, "Cicero's Rhetoric in the Middle Ages," *Quarterly Journal of Speech,*

LIII, (December 1967), pp. 334-41.
(23) *ibid.*, p. 337.
(24) Walter J. Ong, *Ramus-Method, and the Decay of Dialogue,* (Cambridge, 1958), p. 226.
(25) Wilbur S. Howell, "Ramus and English Rhetoric," *Quarterly Journal of Speech,* XXXVII, (October 1951), pp. 299-310.
(26) ———, *General Education and Law Training in the Making of a Great Lawyer,* A. of American Colleges Bulletin, 246 (1952).
(27) Karl N. Llewellyn, "A Realistic Jurisprudence—the Next Step", (*30 Col. L. Rev.* 431, 1930).
(28) Jerome Frank, *Courts on Trial,* (Princeton, 1946).
(29) *Ibid.,* pp. 358-59, 378-391.
(30) ———, *The Idea of Justice and the Problem of Argument,* (New York, 1963).
(31) Felix S. Cohen, "Transcendental Nonsense and the Functional Approach", (35 *Col. L. Rev.* 842, 1935).
(32) Chaim Perelman, *Op. Cit.,* p. 195.
(33) Richard W. Nanstoll, "Regulating Professional Qualification" in *Law in a Changing America* (edited by) Geoffrey C. Hazard, Jr. (New York, 1968), p. 129.
(34) Jerome Frank, *op. cit.*